Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GAME SHOW NETWORK, LLC,	)	
Complainant,	)	MB Docket No. 12-122
	)	File No. CSR-8529-P
v.	)	
	)	
CABLEVISION SYSTEMS CORP.,	)	
Defendant.	)	
	)	
Program Carriage Discrimination	)	

TO: The Commission

REPLY IN SUPPORT OF PETITION OF GAME SHOW NETWORK, LLC TO COMPEL CABLEVISION'S COMPLIANCE WITH INITIAL DECISION

Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Laura Flahive Wu
Stephen Kiehl
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, D.C. 20001-4956
(202) 662-6000

C. William Phillips
Jonathan M. Sperling
Joshua B. Picker
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000

Counsel to Game Show Network, LLC

January 13, 2017

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Cablevision has responded to the Administrative Law Judge's order prescribing prompt remediation for its discriminatory behavior by refusing to take any steps toward compliance. Cablevision also separately seeks a stay of the ALJ's decision—thereby implicitly recognizing that, absent a stay, prompt compliance is required under the Commission's rules. GSN addresses here Cablevision's meritless arguments seeking to establish that it is not required to comply; GSN addresses Cablevision's equally meritless arguments for a stay in its separate opposition to Cablevision's stay petition, filed simultaneously with this Reply.

SUMMARY

The Commission's rules expressly provide that ALJ decisions in Section 616 cases are to be given immediate effect, and the ALJ followed those rules in the ordering paragraphs of his Initial Decision. Prompt implementation of these rules is important; the only meaningful remedy available to Section 616 complainants found to have suffered from discrimination is speedy remediation. That fact, and the importance of fair competition among diverse program entities, form a powerful justification for the prompt implementation of the carriage remedies contemplated in the specific rules governing Section 616 cases.

In its opposition to GSN's motion, however, Cablevision simply ignores the rules and their justifications. It offers instead a lengthy discussion of an *inapplicable* Commission rule and unfounded arguments regarding the Commission's authority. It also raises the equally unavailing suggestion that GSN caused delays in the adjudication of the complaint and therefore should not be able to claim the benefit of the remedies mandated by the ALJ. None of these arguments is accurate or changes the clear meaning of the rules governing this case. They dictate that the Initial Decision, including its paragraphs ordering remediation, should become

immediately effective. Cablevision should be compelled to comply immediately.

ARGUMENT

I. THE COMMISSION SHOULD ORDER CABLEVISION IMMEDIATELY TO COMPLY WITH THE ALJ'S DECISION.

A. The Rules Governing this Proceeding Give the ALJ's Decision Immediate Effect.

Cablevision's arguments simply ignore the two Commission rules that mandate the immediate effect of the ALJ's Initial Decision—Section 76.10, which provides that "in proceedings brought pursuant to [the rules governing carriage disputes under Section 616] the decision by the administrative law judge *will become effective upon release* and will remain in effect pending appeal"[1] and Section 76.1302, which provides that an order issued following a program carriage hearing "*shall become effective upon release*."[2]

These rules mark a different path from that followed in other proceedings involving ALJ decisions, and they do so for specific reasons: Congress and the Commission have reached the judgment that Section 616 complaints should receive "expedited review"[3] and that enforcement in cases where the agency has found discrimination by an MVPD should be immediate and therefore not subject to the rules that contemplate stays pending appeal. In implementing this congressional judgment, the Commission underscored its intention that expeditious resolution of

[1] 47 C.F.R. § 76.10 (c)(2) (emphasis added).

[2] 47 C.F.R. § 76.1302(j)(1) (emphasis added); *see also In the Matter of Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11533 (2011) ("The program carriage rules provide that the remedy ordered by the Media Bureau or ALJ is effective upon release of the decision . . . .").

[3] 47 U.S.C. § 536(a)(4).

carriage complaints means that "[a] ruling on the merits by the ALJ . . . *will become effective upon release*" and that "[s]tays [of such decisions] will not be routinely granted."[4]

Cablevision relies solely on the general provision in Section 1.276 that provides for an automatic stay in *other* types of cases, but that rule cannot affect the primacy of Section 76.20 and 76.1302 here.[5] By its own terms Section 1.276 is superseded when a different scheme is "otherwise ordered by the Commission."[6] That is precisely what Section 76.10 does: It is a Commission order that supersedes Section 1.276 with respect to cable carriage disputes brought under Section 616.[7]

Cablevision finds comfort in its reliance on Section 1.276 because the ALJ's decision included what appears to be a boilerplate footnote reciting that "this Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter."[8] But the ALJ is entitled to be treated as having understood that he is bound by the Commission rules governing Section 616. Therefore, the

[4] *In re Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. Act of 1992 Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, 9 FCC Rcd. 2642, 2656 (FCC 1993).

[5] *See Game Show Network, LLC v. Cablevision Sys. Corp.*, Cablevision Systems Corporation's Opposition to GSN's Petition to Compel Compliance with the Initial Decision, MB Docket No. 12-122, File No. CSR-8529-P, 7 (filed Jan. 3, 2017) [hereinafter Cablevision Opp. to Pet. to Compel] (citing 47 C.F.R. § 1.276(b), (d)).

[6] 47 C.F.R. § 1.276(d).

[7] 47 C.F.R. § 76.10(c)(2) (with respect to carriage disputes, ordering that "unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.").

[8] *Compare* Cablevision Opp. to Pet. to Compel, at 6, 8 (citing *Game Show Network, LLC v. Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 16D-1, ¶ 126 n.534, (ALJ Nov. 23, 2016) [hereinafter Initial Decision]), *with* 47 C.F.R. § 1.276(d) ("No initial decision shall become effective before 50 days after public release of the full text thereof is made unless otherwise ordered by the Commission.").

footnote on which Cablevision relies should be read as no more than a description of when his order would become final if exceptions were not filed.

If, in fact, the ALJ's decision could be read to delay the effectiveness of the order pursuant to Section 1.276—which was plainly not his intention—the Commission nonetheless would be required to enforce the specific Commission rules intended to control dispositions of these cases. And it is clear that the ALJ understood as much: He clearly said what he meant when he directed that "Cablevision must proceed as soon as practicable with [the] remediation" he ordered.[9] That is the only sensible way to give effect to the language the ALJ used.

B. The APA is Not an Impediment to the Rules Mandating the Initial Decision's Immediate Effect.

Cablevision's argument that Section 10 of the Administrative Procedure Act ("APA") somehow invalidates the rules making an initial decision effective upon release is simply incorrect.[10] APA Section 10(c) states that:

> *Except as otherwise expressly required by statute*, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application [for an appeal to superior agency authority] . . . , unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative. . . .[11]

Cablevision asserts that the statute mandates that "to comply with section 10 of the APA, the Initial Decision must remain 'inoperative' while its appeal to the Commission is pending."[12] But the short answer to this contention is that this section of the APA is intended to address the

[9] Initial Decision, at ¶ 126.

[10] *See* 47 C.F.R. §§ 76.10, 76.1302.

[11] 5 U.S.C. § 704 (emphasis added).

[12] Cablevision Opp. to Pet. to Compel, at 10-11.

relationship between agencies and reviewing courts. And here, by statute, orders of the Commission do not become final for purposes of judicial review until parties have exhausted their administrative remedies.[13]

Cablevision itself acknowledges that "[t]he Communications Act expressly bars Cablevision from seeking judicial review of the Media Bureau's HDO without first pursuing administrative review with the Commission."[14] Thus, because the Communications Act "expressly requir[es] by statute" that judicial review remains unavailable until the Commission has completed its review, the portion of Section 10(c) relating to judicial review of "inoperative" decisions simply does not apply to Commission actions under the Communications Act.[15]

[13] An order is final only where it "mark[s] the 'consummation' of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992); *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). The Communications Act expressly provides that "[t]he filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under [47 U.S.C. § 155(c)(1)]." 47 U.S.C. § 155(c)(7). The Court of Appeals has jurisdiction to review only "*final* orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 . . . ." 28 U.S.C. § 2342(1) (emphasis added).

[14] Cablevision Opp. to Pet. to Compel, at 9-11.

[15] Even with respect to other types of administrative action that lack a statute supplying an exhaustion requirement, Section 10(c) solely sets forth the limited circumstances in which an agency's initial decision may give rise to judicial review before it becomes a "final" agency action. The purpose of Section 10(c) is therefore to set forth the general rule that "a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order . . . ." *Wade v. F.C.C.*, 986 F.2d 1433, 1433 (D.C. Cir. 1993) (per curiam). The statute does not proscribe an agency rule giving immediate effect to an initial decision; at most, it supplies a rule of decision for a federal court to determine whether it has jurisdiction to hear an appeal of a non-final agency decision. *See Wade*, 986 F.2d at 1433; *see also Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 624-25 (9th Cir. 2002); *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999).

Likewise, the Supreme Court's opinion in *Darby v. Cisneros*, 509 U.S. 137 (1993), upon which Cablevision relies, *see* Cablevision Opp. to Pet. to Compel, at 10, supports the conclusion that Section 10(c) merely sets out the rules governing the availability of judicial review of an

In sum, Section 10 cannot be read to prevent the Commission from adopting Section 76.10 and Section 76.1302 of the rules and thereby does not prevent the Commission from enforcing those rules providing for the immediate effect of an interim decision.[16]

C. The Due Process Clause Poses No Barrier to Immediate Enforcement of the Initial Decision.

Cablevision's argument that its due process rights are violated by the immediate enforcement of the Initial Decision is also deficient. Specifically, it suggests that the Initial Decision should not be given effect until its arguments regarding its statute of limitations defense and the First Amendment have been considered by the full Commission.[17] It suggests that somehow the mere discussion of these well-settled issues in the D.C. Circuit's decision in *Tennis Channel*[18] renders it important for the full Commission to revisit them before the ALJ's decision is made effective. But as to each of these issues, the discussions to which Cablevision refers

interim decision and does not disturb agency rules regarding immediate effect of such a decision. *Darby* stands for the proposition that an agency's interim decision becomes subject to judicial review in the absence of (1) a statute governing the finality of an agency's decision in a particular context or (2) "a rule that an agency appeal be taken before judicial review is available, and . . . providing that the initial decision would be 'inoperative' pending appeal. *Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review*." *Darby*, 509 U.S. at 152 (emphasis added). The Court observed that "[w]hether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided otherwise . . . ." *Id.* at 144; *see also DSE, Inc. v. United States*, 169 F.3d 21, 27 (D.C. Cir. 1999) ("As *Darby* makes abundantly clear, 'an appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.'").

[16] This conclusion makes practical sense. In setting forth the governing rules giving immediate effect to initial decisions in Section 616 cases, the Commission surely recognized that the rules would sometimes apply in cases where issues had been reserved for consideration by the Commission following the effective date of an initial decision.

[17] Cablevision Opp. to Pet. to Compel, at 11-14.

[18] *Comcast Cable Commcn's, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

were in the opinions of individual judges on the panel that did not obtain support from the other panel members in the case. The court made no changes in what is clearly settled law.

Here, Cablevision's statute of limitations question was fully addressed by the Media Bureau in the Hearing Designation Order, and its rejection of Cablevision's argument was based upon consistently applied agency precedent.[19] The FCC Office of the General Counsel has described that precedent in a similar claim by another MVPD, where the limitations argument raised by Comcast was "rejected twice," and found the claim offered "nothing new or more persuasive."[20] The same applies here.[21]

Cablevision's other "novel" argument, pertaining to the First Amendment, has been rejected repeatedly by the Commission and the courts in other cases, and by the Office of the General Counsel in the *Tennis Channel* case.[22] Cablevision presents no reason to believe that the

[19] *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hearing Designation Order, 27 FCC Rcd. 5113, 5121-25, MB Docket No. 12-122, File No. CSR-8529-P (rel. May 9, 2012) (finding GSN established a *prima facie* case of discrimination and that "we reject Cablevision's contention that GSN's complaint is foreclosed as untimely filed under the program carriage statute of limitations."); *see also* GSN Opp. to Cablevision Appl. for Rev. (Jan. 9, 2017).

As discussed at length in GSN's oppositions to Cablevision's stay petition and application for review, Cablevision's citation to Judge Edwards's subsequent concurrence in the *Tennis Channel* case is unavailing. GSN Opp. to Cablevision Appl. for Rev., at 3-5; GSN Opp. to Stay Pet., Part III.F (Jan. 13, 2017). The concurring opinion has no force of law and goes against the well-established views of the Commission, as well as the Media Bureau's decision in this case.

[20] *In the Matter of Tennis Channel, Inc., Complainant*, 27 FCC Rcd. 9274, 9280 (2012).

[21] *See Game Show Network, LLC v. Cablevision Sys. Corp.*, Game Show Network, LLC'S Opposition to Application for Review of the Hearing Designation Order, 3 (filed Jan. 9, 2017).

[22] *See Tennis Channel, Inc.*, 27 FCC Rcd. at 9284 ("The Commission and courts have repeatedly considered, and rejected, similar [First Amendment] arguments advanced by cable operators.") (collecting cases).

precedents established in a number of D.C. Circuit and Supreme Court decisions should be read to prohibit the remedial orders here.[23]

Taken to their logical conclusion, Cablevision's arguments regarding the statute of limitations and the First Amendment would gut the Commission's well-considered rules mandating immediate enforcement of Section 616 decisions. Surely the Commission was aware when it enacted these rules that substantive issues would be left for the Commission to address following an initial decision. In these cases it nonetheless saw the importance of prompt remediation, and it could not have intended that every respondent be allowed to delay remedial enforcement merely by asserting such questions at this stage.

II. GSN IS SUFFEERING ONGOING AND IRREPARABALE HARM FROM CABLEVISION'S FAILURE TO COMPLY.

Cablevision's bare assertion that GSN would not be harmed by the maintenance of the *status quo* is similarly unavailing and ignores the ample holdings by the ALJ finding *precisely the opposite*. The ALJ held that "[a]s a direct result of Cablevision's discriminatory retiering

[23] The weaknesses of Cablevision's First Amendment argument are discussed at length in GSN's reply to Cablevision's motion to stay and its exceptions, both filed today, and are equally applicable here. *See* GSN Reply to Cablevision Exceptions, at Part II; GSN Opp. to Stay Pet., at Part III.E. Cablevision presents no binding authority to suggest that the First Amendment bars the Commission from directing it to carry GSN more broadly, especially where—as here—the government has a strong interest in remedying past harm. Nor does its change in ownership—which it raises now, for the first time—alter the First Amendment analysis. Cablevision could have presented the ownership change to the Commission months ago. The information it seeks to introduce and the argument regarding its ownership should be ignored. Cablevision's new owner effectively accepted responsibility for this litigation—and any resulting remedial orders—by virtue of the transfer of ownership. Notably, even in its pending motions, Cablevision does not suggest that the case has been mooted by the ownership change, and it could not in fact do so. *See, e.g.*, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973) (holding liabilities transfer to new owner on showing of substantial continuity of business operations); *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd. 15783, 15797 n.110 (MB 2008), *rev'd on other grounds* 25 FCC Rcd. 18099 (2010) (sale of MVPD's affiliate to new owner did not render case moot). The impact of the change in ownership on Cablevision's First Amendment rights is irrelevant to the Commission's authority to impose a remedy for past harm.

conduct, GSN was deprived of approximately [redacted] in annual licensing revenue"; that it "lost approximately [redacted] in annual advertising revenue"; and that GSN has been "unfairly and unreasonably restrained" from competing for viewers in the New York DMA "which in turn, unreasonably impaired GSN's ability to compete for advertisers."[24] The ALJ emphasized that Cablevision's discriminatory conduct "continues to the present day and unreasonably restrains GSN's ability to compete fairly."[25] The record features additional evidence of the continuing harm to GSN, including, *inter alia*, that GSN is barred from accessing millions of viewers in the vital New York market because [redacted];[26] that advertising buyers who live disproportionately in the New York market are unable to sample GSN's programs themselves;[27] and that GSN is less able to make key investments in original programming.[28] In light of the impropriety of Cablevision's conduct, the ALJ ordered the maximum forfeiture permitted by law and directed that Cablevision comply "as soon as practicable."[29] That GSN has been successful in its business during the pendency of this action *despite* Cablevision's ongoing

[24] Initial Decision, at ¶ 115.

[25] *Id.*, at ¶ 120.

[26] *Game Show Network, LLC v. Cablevision Sys. Corp.*, Proposed Findings of Fact and Conclusions of Law of Game Show Network, LLC, MB Docket No. 12-122, File No. CSR-8529, ¶ 183 (filed Sept. 11, 2015) (citing GSN Exh. 103, at CV-GSN 0427076).

[27] *Id.*, at ¶ 193 (citing Zaccario Tr. 744:18-745:5).

[28] *Id.*, at ¶¶ 196-97 (citing Goldhill Tr. 235:2-6, 235:11-15; Zaccario Tr. 723:18-22).

[29] Initial Decision, at ¶ 126. Cablevision's suggestion that delays in this matter are "largely attributable to GSN's own strategic decisions" is disingenuous and has no bearing on the issues. *See* Cablevision Opp. to Pet. to Compel, at 14-15. The only significant delays resulted from the consideration by the D.C. Circuit of the *Tennis Channel* case, which had direct relevance to the standard applicable here. Cablevision and GSN mutually agreed to those delays in the interests of efficiency and to create a full record for the ALJ to consider.

discrimination does not mean that Cablevision is excused from compliance with the relief mandated by the rules and ordered by the ALJ, or that GSN would not be irreparably harmed by the maintenance of the *status quo*.[30]

CONCLUSION

The Commission's rules mandate that the Initial Decision take immediate effect. Cablevision's opposition simply fails to address this fact with any relevant authority. GSN's motion to compel should be granted and, for the reasons set forth in GSN's separate brief, Cablevision's petition for a stay pending consideration of its exceptions should be denied.

Respectfully submitted,

C. William Phillips
Jonathan M. Sperling
Joshua B. Picker
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000

Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Laura Flahive Wu
Stephen Kiehl
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001-4956
(202) 662-6000

Counsel to Game Show Network, LLC

January 13, 2017

[30] GSN addresses Cablevision's assertion that it would be harmed if it were required to carry GSN in its opposition to Cablevision's stay petition. For these purposes we note that the Commission's Office of General Counsel addressed and dismissed virtually the same arguments in denying Comcast's motion for a stay in *Tennis Channel*. *See In the Matter of Tennis Channel Inc., Complainant*, 27 FCC Rcd. 9274, 9274 (OGC 2012). Cablevision's complaints about any harm to it from the cost of compliance ring hollow given the minimal expenses it would incur by broader carriage of GSN and that it has been immensely profitable during the pendency of this litigation. *See* GSN Exh. 401A (chart summarizing Cablevision financial disclosures showing $56 million in dividend and non-dividend compensation paid to Cablevision then-controlling shareholders in 2010 and 2011); *see also* Montemango Tr. 1583:21-1590:25.

CERTIFICATE OF SERVICE

I, Stephen Kiehl, hereby certify that on January 13, 2017, copies of the foregoing were served by electronic mail and hand and/or overnight delivery upon:

Tara M. Corvo
Robert G. Kidwell
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.,
Suite 900
Washington, D.C. 20004
(202) 434-7300

Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017
(212) 935-3000

Jay Cohen
Andrew G. Gordon
Gary R. Carney
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Counsel to Cablevision Systems Corporation

Travis LeBlanc
Chief
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Pamela Kane
Special Counsel
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William Knowles-Kellett
Investigations and Hearings Division,
Enforcement Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Counsel to the Enforcement Bureau

Bill Dever
Special Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Linda L. Oliver
Associate General Counsel
Chief, Administrative Law Division
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jennifer Tatel
Acting Deputy General Counsel
Chief of Staff
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Office of General Counsel

/s/ Stephen Kiehl
Stephen Kiehl